80-1138

Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MAYOR AND CITY COUNCIL OF BALTIMORE
And
JAMES J. DEMBECK,
Petitioners,

v.

JAMES CROCKETT
And
MARY CROCKETT, his wife,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

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QUESTION PRESENTED

Whether a municipal ordinance effectively banning "For Sale" signs on individual dwelling units in residential districts may be declared in violation of the First Amendment privilege of commercial free speech, on a motion for summary judgment.

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OPINIONS BELOW

The Order of the Court of Appeals of Maryland (App. 1) denying the petition for writ of certiorari is noted at _____ Md. App. _____ , 1980. The judgment and opinion of the Court of Special Appeals of Maryland (App. 20) affirming the decision of the Circuit Court for Baltimore City is reported at 45 Md. App.

682 (1979). The oral opinion of Judge Mary Arabian in the Circuit Court of Baltimore City, Case No. A-57188, Docket 1977, Folio A-821, granting Respondents' motion for summary judgment and dismissing Petitioners' bill of complaint is set forth in the Appendix, *infra*, at 32. The report and recommendation of the general Equity Master is set forth in the Appendix, *inf.* at 35.

JURISDICTIONAL GROUNDS

The Order of the Court of Appeals of Maryland denying the Petitioners' petition for a writ of certiorari to the Court of Special Appeals of Maryland was entered on October 10, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), which provides for review where the validity of a State law is challenged as being repugnant to the Constitution of the United States.

CONSTITUTIONAL PROVISION AND ORDINANCES

United States Constitution, First Amendment.

AMENDMENT 1

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Baltimore City Code, Article 30–Zoning (Ordinance 1051, 1971) Chapter 10–Sign Regulations.

10.0-2 Signs in Residence and Office-Residence Districts.

Signs in Residence and Office-Residence Districts shall comply with and be subject to the following provisions:

a. General provisions:

1. No sign shall have or consist of any moving, rotating, or otherwise animated part; or (when permitted to be illuminated) any flashing, blinking, fluctuating, or otherwise animated light.

2. No roof sign, wind sign, or general advertising sign (billboards and posterboards) shall be permitted.

3. No sign shall extend above the roof line of a building to which it is attached.

4. No sign shall project beyond the street line into the public way, unless otherwise stated in this section.

b. The following types of signs, subject to the limitations prescribed for them, shall be permitted for uses authorized as principal or conditional uses in Residence and Office-Residence Districts:

1. One non-illuminated sale or lease sign for each street frontage of the lot, not exceeding a height of five feet, and having an area not exceeding six square feet. For multiple-family dwellings, apartment hotels, and non-residential buildings such signs shall not exceed a height of eight feet if free standing and not above the roof line if attached to a building, and not exceed an area of 36 square feet.

1974 Amendment to Section 10.0-2b-1. (Ordinance 701, 1974)

b. The following types of signs, subject to the limitations prescribed for them, shall be permitted

for uses authorized as principal or conditional uses in Residence and Office-Residence Districts:

1. One non-illuminated sale or lease sign for [each street frontage of the lot, not exceeding a height of five feet, and having an area not exceeding six square feet. For] multiple family dwellings, apartment hotels, and non-residential buildings. *Such* [such] sign shall not exceed a height of eight feet if free standing, and *shall* not *extend* above the roof line if attached to a building and *shall* not exceed an area of 36 square feet.

STATEMENT OF THE CASE

In 1971, Baltimore City adopted a comprehensive zoning ordinance (Ordinance No. 1051, approved April 20, 1971) which contained detailed sign controls for each type of district, including restrictions on virtually all commercial signs in residential districts. However, by exception to its general provisions, the ordinance permitted "for sale" signs with limitations as to number, size and placement in residential districts. In 1974, the City amended the zoning ordinance (Ordinance No. 701, approved July 19, 1974) so as to limit the use of "for sale" signs to multiple-family dwellings, apartment hotels and non-residential buildings, effectively prohibiting such signs on individual dwelling units in residential districts.

On December 13, 1977, the Mayor and City Council and its Zoning Administrator ("the City") filed a bill of complaint in the Circuit Court of Baltimore City (A-821/1977/A-57188) against James and Mary Crockett ("The Crocketts") to enjoin the erection of a "for sale" sign on their individual dwelling unit in a residential district in violation of the amended zoning ordinance. The Crocketts filed an answer admitting the technical violation but raising the constitutional question that the ordinance violated their right of free speech as guaranteed by the First Amendment to the Constitution of the United States. The Crocketts then filed a motion for summary judgment.

The City first raised the issue now before this Court in its answer to said motion, asserting "a genuine dispute between the parties as to material facts in that the Defendants contend that Section 10.0-2 of the Zoning Ordinance is strictly a ban on 'For Sale' signs and therefore illegal and unconstitutional in that it violates the defendants' right of free speech, whereas the City contends as is set forth in the attached affidavit of the Zoning Administrator James J. Dembeck that Section 10.0-2 is part of the comprehensive zoning ordinance, and that the limitation of commercial advertising in a residential area is a legitimate exercise of the police power through the adoption of [a] proper zoning ordinance." Joint Record Extract in the Court of Special Appeals of Maryland ("JRX"), E. 14. Both parties filed affidavits (JRX, E. 16-17, 62-64) and a stipulation (JRX, E. 18-19), attached to which was the City Council file pertaining to Ordinance No. 701 (JRX, E. 20-61). The file evidenced the concerns of the City Council in promoting, among other things, the integrity and stability of Baltimore neighborhoods. The City Council felt this could be done most effectively by simply eliminating the exception and conforming the restriction on real estate signs to the general restrictions on commercial signs.

The motion for summary judgment was first considered by a General Equity Master who recommended that it be granted (App. 35) relying solely on the decision in *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977). At a hearing on exceptions to the Master's recommendation, the City specifically raised the federal question sought to be reviewed in this Court by showing that the granting of summary judgment would prevent appropriate review of the constitutional question in the case. The City indicated some of the many evidentiary items it would proffer, e.g., testimony of the Zoning Administrator and City Councilpersons regarding the legislative purpose, live and documentary testimony regarding the facts of the Baltimore City real estate sales situation, statistics on transiency in the community, and testimony that the use of "for sale" signs in Baltimore directly contributed to neighborhood panic and instability (JRX, E. 71-73). The City also asserted that the defendant hadn't met its

burden of proving the ordinance unconstitutional by the mere filing of a single affidavit in support of its motion (JRX, E. 81-82).

However, Judge Arabian in her oral opinion stated that "all of those facts [which the City would proffer at trial] were before the Master, by way of stipulation, and the Court has carefully reviewed them." (App. 32). The Court ignored the obvious dispute of material fact, adopted the report and recommendation of the Master, and on July 18, 1979, signed an Order granting the Crocketts' motion for summary judgment and dismissing the City's bill of complaint.

On appeal to the Court of Special Appeals of Maryland, the City in its Brief raised the constitutional issues whether a municipal government may constitutionally prohibit certain forms of commercial advertising in limited areas within its jurisdiction, and whether a grant of summary judgment was unwarranted.[1]

The Court of Special Appeals of Maryland issued an Opinion (June 12, 1980) and Mandate (July 14, 1980) affirming Judge Arabian's decree (App. 18, 20). The Court construed *Linmark* as being dispositive of the First Amendment issue.

Upon petition to the Court of Appeals of Maryland for a writ of certiorari to the Court of Special Appeals (App. 2) Petitioners presented for review the question:

> May an important issue of First Amendment privilege be decided on a motion for summary judgment?

The Court of Appeals on October 10, 1980, ordered that the petition be denied (App. 1). Upon such denial by the Court of Appeals of Maryland, this petition for a writ of certiorari was filed.

REASONS FOR GRANTING THE WRIT

The case at bar presents the novel question whether a municipal ordinance effectively banning "for sale" signs can be struck down summarily as an impermissible infringement on the

content of commercial speech without an evidentiary hearing at any stage of the proceedings. That is, Petitioners would have the Court decide whether such a law is unconstitutional on its face and in every circumstance, or whether it must be considered from the standpoint of permissible purpose, reasonable restriction on time, place and manner, availability and effectiveness of other means of communication of information, and overall impact on the recipients of the commercial speech. *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977).

In the present case, the City of Baltimore was never afforded the opportunity to present evidence bearing on the issue whether there existed a compelling or significant governmental interest in the enactment of its 1974 Zoning Amendment. The City was further denied an effective opportunity to prove that the amendment directly advanced the municipal interest in maintaining racial stability and integration within its neighborhoods[2], or that this regulatory technique was no more extensive than necessary to protect and serve that interest. *Central Hudson Gas & Electric Corp. v. Public Service Comm. of N.Y.*, _____ U.S. _____ , 100 S. Ct. 2343 (1980). Such proof cannot realistically be produced through the use of affidavits.

The Courts below were unanimous in holding that, based on the *Linmark* decision, a court could merely rubberstamp as an unconstitutional abridgment of commercial free speech the City Zoning Amendment effectively banning "for sale" signs. They simply and simplistically held that any analysis of benefits and burdens was foreclosed by *Linmark*; that an ordinance banning real estate signs–though curiously not other similar signs–was unconstitutional on its face, without consideration of attendant circumstances. The Maryland Courts unanimously held *Linmark* dispositive in declaring the 1974 Zoning Amendment unconstitutional, despite the fact that *Linmark* and its predecessors, including *Valentine v. Christensen*, 316 U.S. 52 (1942); *Breard v. Alexandria*, 341 U.S. 622 (1951); *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973); *Bigelow v. Virginia*, 421 U.S. 809 (1975); and *Virginia State Board of Pharmacy v. Virginia Citizens*

Consumer Council, Inc., 425 U.S. 746 (1976), rested their holdings on an extensive evaluation of the facts adduced after a full-blown adversary proceeding involving the presentation of both documentary evidence and live witnesses on both sides.

The rationale underlying the extensive factual analysis undertaken by this Court in deciding prior commercial speech cases rests on the basic premise that a balancing test must be applied which is inherently not susceptible to a summary judgment disposition. The governmental interest served by the ordinance must be weighed against the incidental infringement on commercial free speech. This Court, in *Linmark* at pages 94-95 specifically stated:

> Respondents do seek to distinguish Bigelow and Virginia Pharmacy Bd. by relying on the vital goal this ordinance serves: namely, promoting stable, racially integrated housing. There can be no question about the importance of achieving this goal. This Court has expressly recognized that substantial benefits flow to both whites and blacks from interracial association and that Congress has made a strong national commitment to promote integrated housing. Trafficante v Metropolitan Life Ins. Co. 409 U S 205, 34 L Ed 2d 415, 93 S Ct 364 (1972).

The Court ultimately held at page 95 that:

> The record here demonstrates that Respondents failed to establish that this ordinance is needed to assure that Willingboro remains an integrated community.

In *Linmark*, this Court expressly found that the Township of Willingboro failed to produce sufficient evidence to sustain its constitutional burden of creating a substantial nexus between the governmental interest sought to be protected and the means by which said interest was to be attained.

The Maryland Courts denied the City of Baltimore an opportunity to produce evidence bearing on the issue whether an effective ban on "for sale" signs in residential neighborhoods is necessary to achieve viable integration or needed to assure

that Baltimore remains an integrated community. This opportunity was afforded the Township of Willingboro although it failed to sustain its constitutional burden. A similar opportunity was afforded the Virginia Board of Pharmacy, although it too failed to sustain its burden.

This Court, in *Linmark* at page 95, did express the alternative view that:

> . . .in any event, the First Amendment disabled the State from achieving its goal by restricting the free flow of truthful information. For the same reasons we conclude that the Willingboro ordinance at issue here is also constitutionally infirm.

However, this seemingly absolute proposition was placed in proper perspective by this Court's subsequent factual evaluation in support of its conclusion that the Willingboro ordinance was constitutionally infirm. Upon finding the empirical data submitted by Willingboro in support of its claim of "white-flight" to be tenuous at best, this Court continued its analysis by weighing the unsubstantiated fears of the City Council against the right of Willingboro residents to disseminate truthful commercial information. This Court then analyzed the overall effect of such a regulation by stating at pages 96-97:

> If dissemination of this information can be restricted then every locality in the country can suppress any facts that reflect poorly on the locality, so long as a plausible claim can be made that disclosure would cause the recipients of the information to act "irrationally." Virginia Pharmacy Bd. denies government such sweeping powers.

However, this analysis must be viewed in light of Footnote 9, *Linmark* at page 95, which specifically states:

> As the District Court itself observed, its finding concerning the lack of panic selling distinguishes this case from Barrick Realty, Inc. v. City of Gary, 491 F 2d 161 (CA 7 1974) in which Gary, Indiana's prohibition on "For Sale"

> signs was upheld on a record indicating that such signs were causing "whites to move en masse and blacks to replace them". Id., at 163-164. We express no view as to whether Barrick Realty can survive Bigelow and Virginia Pharmacy Bd.

In *Barrick*, the record did indicate that "for sale" signs were causing "white-flight", which resulted in blacks replacing whites. In *Linmark*, the record was devoid of such proof. In *Virginia Board of Pharmacy* the record was also devoid of any proof that the regulation of pharmacy price-posting would support the governmental interest alleged. Therefore, in both *Linmark* and *Virginia Board of Pharmacy*, the record indicated only an "unsubstantiated fear" of the possible effect of deregulation and evidenced only a "plausible claim" that disclosure would cause the recipients to act "irrationally." *Linmark*, at page 96. In *Barrick*, the fear was not unsubstantiated and the claim was not merely plausible but was in fact real, thereby rendering the "for sale" sign ban a constitutional exercise of governmental power. Therefore, a regulation of the "free flow of truthful information" in a commercial setting is not subject to any absolute restriction, but must be examined factually in balancing the countervailing interests of the parties involved.

The above analysis confirms the conclusion that the factual record is critical to resolution of First Amendment commercial speech issues. The City of Baltimore was summarily denied the right to create such a record as would pass constitutional scrutiny.

More recently, in *Central Hudson Gas and Electric Corporation v. Public Service Commission of New York*, _____ U.S. _____ , 100 S. Ct. 2343 (1980), this Court summarized the standard of review in commercial speech cases as follows at S. Ct. page 2351:

> In commercial speech cases, then, a four part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading.

> Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

This test, which broadens the *Linmark* standard of review, again stresses the importance of a factual determination as to the effectiveness of the regulation in advancing the governmental interest as well as an offering of proof evidencing that the regulation is the least restrictive alternative available to the governmental entity.

Whether the City's 1974 Zoning Amendment will fall within the guidelines established by *Linmark, Central Hudson* and their predecessors, *supra*, as a constitutionally permissible regulation of commercial speech is a question that can only be resolved by a record established in the course of an adversary proceeding and not summarily without a trial thereon.

The regulation of commercial speech by a governmental entity is not subject to the same constitutional scrutiny as is a regulation of non-commercial speech. In *Central Hudson* this Court expressed the view at S. Ct. page 2350 that:

> The Constitution, therefore, accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. Id., [Ohralik v. Ohio State Bar Assn.], 436 U.S., at 456, 457, 98 S. Ct., at 1918, 1919. The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.

Clearly, there exist no absolutes in cases involving alleged infringements on commercial speech by a governmental entity. *Central Hudson* clearly implies that the gravamen of commercial speech litigation is the evaluation of the relationship between the restraint and the governmental interest asserted. Inherent in such an analysis is the necessity of a well-developed factual record evidencing either the existence or non-existence of the constitutional nexus described above.

The argument advanced above is supported by *Kennedy v. Silas Mason Company*, 334 U.S. 249 (1948), a case in which this Court reversed a summary judgment in an action under the Fair Labor Standards Act brought by workers in a munitions plant for overtime pay. After a thorough analysis of the facts peculiar to the case at bar, the Court concluded that the result in such a case should not rest on an indefinite factual foundation. In documenting this holding the Court stated:

> We do not hold that in the form the controversy took in the District Court that tribunal lacked power or justification for applying the summary judgment procedure. But summary judgment procedures, however salutory where issues are clearcut and simple, present a treacherous record for deciding issues of far-flung import on which this Court should draw inferences with caution from complicated courses of legislation, contracting and practice.
>
> We consider it the part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts. *While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide.*

Kennedy, at 256-257 (emphasis supplied). Accord, *Pacific American Fisheries, Inc. v. Mullaney*, 191 F.2d 137 (CA 9 1951).

The Maryland Courts ignored the mandate pronounced in *Kennedy*. A judgment was unanimously reached on a question of substantial constitutional import which, given the paucity of evidence presented, inherently lacked the thoroughness required.

The issue presented in the aforegoing writ of certiorari has nationwide significance. On July 11, 1980, the City of Chicago noted an appeal to the Appellate Court of Illinois, First Judicial

District, from a decision of the Circuit Court of Cook County, Illinois, holding its municipal "for sale" sign ban ordinance unconstitutional based on *Linmark.*[3] The narrow issue presented in the Appellant's Brief is

> whether the Circuit Court erred in holding a municipal ordinance unconstitutional on a motion to dismiss without balancing the asserted governmental interest against the incidental intrusion on defendant's first amendment rights.

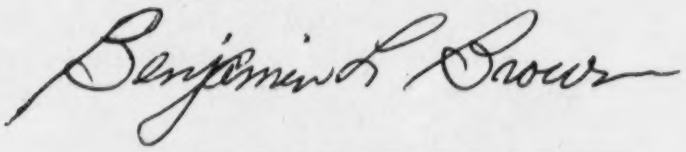
As in the case at bar, the City of Chicago was never given an opportunity to present evidence. The Circuit Court of Cook County found *Linmark* dispositive in holding Chicago's "for sale" sign ban unconstitutional on its face as violative of the First Amendment of the United States Constitution and summarily decided that no set of facts could validate the ordinance. Barrick has been effectively overruled through judicial interpretation of the *Linmark* decision although this Court specifically withheld such a pronouncement in *Linmark*, at Footnote 9. A factual analysis and ultimate weighing test has become irrelevant.

If *Linmark* stands for the proposition that a municipal ban on "for sale" signs is a *per se* unconstitutional infringement on commercial free speech, then the Maryland Courts have ruled correctly in the case at bar. If, on the other hand, as Petitioners contend, *Linmark* is to be construed as creating no absolutes, the Maryland Courts have erroneously denied the City of Baltimore the right to present evidence in an adversary setting to support its contention that factually *Linmark* is markedly distinguishable from the case at bar.

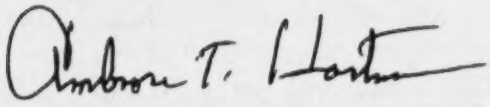
CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Court of Special Appeals of the State of Maryland.

Respectfully submitted,



BENJAMIN L. BROWN
City Solicitor



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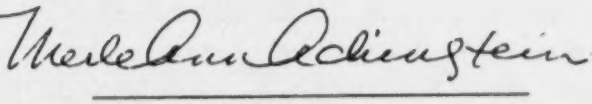

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FOOTNOTES

[1] Questions Presented and Argument from Appellants' Brief at pages 2, 8.

QUESTIONS PRESENTED

1. May a municipal government under any circumstances, in the legitimate exercise of its police powers, prohibit certain forms of commercial advertising in limited areas within its jurisdiction, consonant with constitutional privileges?

2. Does the record below disclose a genuine dispute of material fact with respect to the constitutional basis of the City sign ordinance, such that summary judgment was unwarranted?

ARGUMENT

The decision of the court below, awarding summary judgment against the City, may be affirmed only if the restriction on real estate signs is unconstitutional on its face. The decree should be reversed if there exists any set of facts and circumstances under which the ordinance would not be constitutionally infirm.

The First Amendment to the U. S. Constitution has only on the most rare occasions been held to void a statute or ordinance on its face, rather than in its application to specific facts, and in those cases, nearly always after a full trial of the merits.

In the emerging area of protection of what has been designated "commercial speech," the U. S. Supreme Court has consistently applied a balancing-test approach to determine whether a particular governmental restriction of speech is reasonable and sustainable under all of the conditions and circumstances then prevailing.

The award of summary judgment was improper in this case, since the lower court did not have before it the necessary, and necessarily complex, evidence of these facts to weigh and balance. It is simply impossible upon affidavit, without trial, to present material and sufficient evidence of the City's policies advanced by the sign restriction, evidence of alternate means adequate to communicate the same information, and evidence of the effect of the ordinance since its enactment in 1974.

Because of clear constitutional principles applicable to this controversy, and because the facts necessary to such constitutional determination are absent from the record, the award of summary judgment must be reversed.

[2]The only evidence before the Maryland Courts as to governmental purpose was the City Council file on Ordinance No. 701, attached to the Stipulation in the Circuit Court of Baltimore City, excerpts from which follow.

a. Report on "City Wide Support of Ordinance [No. 701], " from Greater Northwood Community Council:

> Support for a ban on "for sale" signs appears to be unanimous throughout the city with the exception of real estate interests. Ordinance [No. 701] was introduced in an effort to eliminate the unrest and panic selling induced by the presence of "for sale" signs in integrated neighborhoods. These neighborhoods are subject to many pressures which if permitted unchecked will lead to resegregation and the continued flight of middle income homeowners from the city.
>
> A sign ban in effect for 2 years in the Liberty Road area of Baltimore County has been successful in stemming white panic and creating a climate for increased racial understanding. A city wide ban is not unique. Chicago, St. Louis, and Gary, Indiana have successfully enacted similar laws. The Maryland State Commission on Human Relations has specifically supported a ban on the use of "for sale" signs in integrated urban neighborhoods as a means of insuring their stability.
>
> * * *
>
> The future of the integrated neighborhoods of Baltimore may well depend on the passage of this ordinance. A ban on signs will help maintain an integrated city. Rather than an increase in racial tension and polarization caused by white panic and flight, the communities of Baltimore can become examples of healthy, viable integrated neighborhoods. HEW directives will not be necessary.

b. Letter of May 7, 1973, to Zoning Board Executive Secretary Gilbert Rubin from Northeast Baltimore Community Organization:

It was Mr. Embry's [Commissioner of Housing] firm conviction that passage on a city wide basis would harm no neighborhood but would provide needed assistance to communities under selling pressure.

c. Letter of October 5, 1973, to Fifth District Councilmen from Mt. Washington Improvement Association:

I would like to advise you that our Association is in favor of Ordinance [701].... In view of this and because our Board of Directors agrees that For Sale signs can have a detrimental effect on the stability of a neighborhood it was formally acted upon at our last Board meeting.

d. Letter of October 1, 1973, to Councilman Francis X. Gallagher from Cheswolde Neighborhood Association:

Our neighborhood, though empathic to the problem of home owners in selling their property, is persuaded that the interest of the community as a whole in preventing the instability that a rash of such signs can cause must take precedence.

e. Letter of May 20, 1974, to Councilman Francis X. Gallagher from St. Agnes Neighborhood Association:

We need to do much more than pay lip service to the idea that stable neighborhoods are an essential part of a living city. We need to establish and enforce ordinances that make such neighborhoods possible and insure the survival of those already in existence.

f. Letter of July 1, 1974, to Mayor William Donald Schaefer from Ednor Gardens-Lakeside Civic Association:

The frail excuses put forth by realtors and other groups should have no influence since the good of this entire City concerning real estate transactions are at stake and the stability of all neighborhoods should be of first concern.

g. Letter of May 21, 1974, to the City Council Judiciary Committee from Uplands Community Association:

> The Uplands Community Association unanimously supports Ordinance No. [701], which bans "For Sale" signs in residential communities, and urges its immediate passage and implementation to help preserve the stability of our neighborhood as well as the many other neighborhoods throughout Baltimore City, which are all struggling to maintain their integrity.
>
> We have been fighting the battle of the use and abuse of "For Sale" signs in our community for several years with very little success.

[3] *City of Chicago v. Louis Prus, et al.*, in the Circuit Court of Cook County, Illinois, Municipal Department, First District (No. 79 MC1 470772, June 25, 1980). Appeal filed in Appellate Court of Illinois, First Judicial District (No. 80-2043). Appeal pending.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of January, 1981, three copies of the aforegoing Petition for a Writ of Certiorari to the Court of Special Appeals of Maryland and Appendices were mailed, first-class postage prepaid, to A. Dwight Pettit, Esquire, Suite 3700, 222 St. Paul Place, Baltimore, Maryland 21202, Henry M. Decker, Jr., Esquire, and David K. Hayes, Esquire, 9 West Mulberry Street, Baltimore, Maryland 21201, Attorneys for Respondents, James and Mary Crockett, and that all parties required to be served have been served.

Merle Ann Achinstein

MERLE ANN ACHINSTEIN
Chief City Solicitor

APPENDIX A

THE MAYOR AND CITY COUNCIL OF BALTIMORE et al.	:	In the Court of Appeals of Maryland
	:	Pet. Docket No. 269
v.	:	Sept. Term 1980
	:	No. 1139, Sept. Term 1979
JAMES CROCKETT et ux.	:	Court of Special Appeals

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: October 10, 1980

APPENDIX B

IN THE COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 1980

NO.

THE MAYOR AND CITY COUNCIL OF BALTIMORE, et al.,
Petitioners,

v.

JAMES CROCKETT, et ux.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF SPECIAL APPEALS OF MARYLAND

Benjamin L. Brown
City Solicitor,

Michael A. Pretl,
Smith, Somerville & Case
Special Deputy City Solicitors

Attorneys for Petitioners.

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The petitioners, the Mayor and City Council of Baltimore and its zoning administrator, respectfully petition for certiorari to review and reverse or clarify a decision of the Court of Special Appeals of Maryland which voided a City ordinance as repugnant to the First Amendment to the United States Constitution.

THE DECISION BELOW

The matter was decided by the Court of Special Appeals of Maryland under the name *The Mayor and City Council of Baltimore et al. v. James Crockett et ux.*, September Term 1979, No. 1139. Appended hereto is a copy of the opinion of that Court filed on June 12, 1980. The mandate of the Court of Special Appeals was issued on July 14, 1980.

QUESTIONS FOR REVIEW

1. Assuming *arguendo* that a municipality may not constitutionally prohibit real estate sales signs in residential neighborhoods, may other sign controls traditionally encompassed within comprehensive zoning ordinances survive a First Amendment challenge?

2. May an important issue of First Amendment privilege be decided on a motion for summary judgment?

CONSTITUTIONAL PROVISIONS AND ORDINANCES

United States Constitution, First Amendment.

AMENDMENT 1

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Baltimore City Code, Article 30 - Zoning (Ordinance 1051, 1971) Chapter 10 - Sign Regulations.

10.0-2 Signs in Residence and Office - Residence Districts.

> Signs in Residence and Office-Residence Districts shall comply with and be subject to the following provisions:
>
> a. General provisions:
>
> 1. No sign shall have or consist of any moving, rotating, or otherwise animated part; or

(when permitted to be illuminated) any flashing, blinking, fluctuating, or otherwise animated light.

2. No roof sign, wind sign, or general advertising sign (billboards and posterboards) shall be permitted.

3. No sign shall extend above the roof line of a building to which it is attached.

4. No sign shall project beyond the street line into the public way, unless otherwise stated in this section.

b. The following types of signs, subject to the limitations prescribed for them, shall be permitted for uses authorized as principal or conditional uses in Residence and Office-Residence Districts:

1. One non-illuminated sale or lease sign for each street frontage of the lot, not exceeding a height of five feet, and having an area not exceeding six square feet. For multiple-family dwellings, apartment hotels, and non-residential buildings such signs shall not exceed a height of eight feet if free standing and not above the roof line if attached to a building, and not exceed an area of 36 square feet.

1974 Amendment to Section 10.0-2b.1 (Ordinance 701, 1974)

b. The following types of signs, subject to the limitations prescribed for them, shall be permitted for uses authorized as principal or conditional uses in Residence and Office-Residence Districts:

1. One non-illuminated sale or lease sign for [each street frontage of the lot, not exceeding a height of five feet, and having an area not exceeding six square feet. For] multiple family dwellings, apartment hotels, and non-residential buildings. *Such* [such] sign shall not exceed a height of eight feet if free standing, and *shall* not *extend* above the roof line if attached to a building and *shall* not exceed an area of 36 square feet.

STATEMENT OF THE CASE – FACTUAL AND LEGAL BACKGROUND

A. Zoning laws and sign controls.

For more than fifty years, municipalities in the United States have used zoning as an effective tool to plan and regulate use of real property in the public interest. The social benefits of zoning are well known, and the practice of comprehensive zoning is virtually universal among municipalities today. See 8 McQuillin, *The Law of Municipal Corporations,* §25.01 *et seq.*

Since the decisions of the United States Supreme Court in *Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926), and *Nectow v. Cambridge*, 277 U.S. 183 (1928), it has not been seriously questioned that zoning is a valid exercise of a state's police powers.

Comprehensive zoning laws generally have included provisions restricting commercial and other signs and forms of advertising in non-commercial zones or districts. In the *Euclid* case, *supra*, the Ohio municipal ordinance sustained over constitutional challenge contained detailed provisions "including restrictions and regulations as to the use of bill

boards, sign boards and advertising signs." 272 U.S. at 382. Actually before *Euclid*, in *St. Louis Poster Adv. Co. v. St. Louis*, 249 U.S. 269, 274 (1919), Justice Holmes gave his blessing to sign restrictions "in the residence district of a city, in the interest of the safety, morality, health, and decency of the community."

The general law has developed, as stated by McQuillin, that

> "Billboards and signs are subject to regulation and restriction by a municipal corporation under general police measures, as well as under zoning laws and ordinances. Such structures or devices may be excluded from particular zones or districts, or even from the entire municipality, provided the restriction is reasonable, and substantially related to the public welfare." 8 McQuillin, *supra*, §25.131 j, citing cases.

Literally hundreds of decisions regarding sign restrictions, rendered by federal and state courts, are cited in 7 McQuillin, *supra* §§24.380 - 24.388, and there would appear to be universal recognition that such ordinances are permissible if reasonably related to the purposes underlying the police powers.

This Court likewise on a number of occasions has considered the public policies expressed in municipal zoning laws in general, and sign controls in particular. *Cochran v. Preston*, 108 Md. 220 (1908); *Landay v. MacWilliams*, 173 Md. 460 (1938); *Dobres v. Schwartzman*, 191 Md. 19 (1948); *Anne Arundel County v. Ward*, 186 Md. 330 (1946); *Mayor & City Council of Balto. v. Byrd*, 191 Md. 632 (1949). Essentially a balancing technique, under appropriate standards, is employed to determine the validity of zoning decisions. *Huff v. Board of Zoning Appeals*, 214 Md. 48 (1957).

In *Grant v. Baltimore*, 212 Md. 301 (1956), the Court reviewed briefly the history of zoning laws in the City, noting (at 305) that:

> "From the beginning of zoning in Baltimore, billboards were excluded prospectively from residential districts . . . ."

Judge (later Chief Judge) Hammond, in his opinion, left little doubt as to the right of a municipality to control sign advertising through its zoning authority. In discussing the objections to such signs, as well as the level of proof necessary to show that a ban on signs is for the benefit of the public health, safety and welfare, the Court said (at 316-317):

> "In considering this question, we pay heed to the rule that a legislative determination of facts and conditions calling for the passage of a law, either spelled out or implicit in the legislation, is entitled to very great, although, of course, not conclusive weight. The preamble of Ordinance 1101 of 1950, the first ordinance to require elimination of the offending signs, announced the legislative finding that residential neighborhoods 'are now blighted or threatened with blight, by billboards, both illuminated and non-illuminated' that ' . . . always depreciate the value of residential property and are a menace to home atmosphere and home surroundings.' The legislative exercise of the police power is presumed to be valid and a successful attack upon it ' . . . must show affirmatively and clearly that it is arbitrary, capricious, discriminatory or illegal, so that necessarily a review by a court is narrow in scope.' "

See also *Maryland Adv. Co. v. Baltimore*, 199 Md. 214 (1952); *Gilmor v. Mayor & City Council*, 205 Md. 557 (1954); *Brebow v. Mayor & City Council*, 217 Md. 337 (1958); *Baltimore v.*

Charles Center Parking, Inc., 259 Md. 595 (1970); *Mayor & City Council v. Mano Schwartz, Inc.*, 268 Md. 79 (1973); *Donnelly Adv. Co. v. Mayor & City Council*, 279 Md. 660 (1977).

The most recent and last-cited of these decisions, *Donnelly Adv. Corp. v. Mayor & City Council*, included a challenge on First Amendment grounds, and will be discussed in detail below.

B. The City zoning ordinance.

Baltimore City has had zoning laws including sign controls for many years, as mentioned in *Grant, supra*. In 1971 various related provisions were brought together, reviewed and reworked into a comprehensive and multi-faceted zoning ordinance adopted by the City Council as Ordinance 1051, 1971. Chapter 10 of that ordinance prescribes detailed restrictions on signs and advertising in each of the major categories of districts, industrial, commercial and residential.

Needless to say, the restrictions on commercial advertising are most stringent in the residential districts. Although there are a number of exceptions for what are essentially identifying or directional signs, virtually all advertising or commercial signs are prohibited by Section 10.0-2 of the ordinance applicable to those districts.

The one glaring exception to the rule, as the ordinance was enacted in 1971, was the "sale or lease sign" erected by real estate companies. Despite the commercial or advertising nature of these signs, the City Council in 1971 carved out an exception for the real estate industry in enacting otherwise comprehensive zoning.

This exception was eliminated by amendment in 1974, namely Ordinance 701, 1974. This amendment actually added nothing (but punctuation) to the existing law, but deleted

a total of twenty-three words from Ordinance 1051 as adopted in 1971. It is most important to the present argument to appreciate this fact - - that the ordinance challenged as unconstitutional is not a specific law precluding "for sale" signs, but rather a comprehensive sign control ordinance which since 1974 has simply lacked an exception affirmatively permitting such real estate signs. The significance of this fact will be apparent.

C. Protection of commercial speech.

The recent facts giving rise to the litigation are not in dispute; respondents apparently concede that this is a "test case" to challenge the law.

Respondents are the owners of improved real property located at 1929 McCulloh Street in Baltimore City, and respondent James Crockett is himself a licensed real estate broker. On September 19, 1977, a zoning violation notice was duly issued by the City indicating that a sale sign was posted on the property, and requiring removal within twenty-four hours. When the sign was not removed, the present action was instituted in the Circuit Court of Baltimore City on December 13, 1977, seeking to enjoin violation of the zoning ordinance.

Respondents in defense admitted the technical violation. However they asserted that the sign constituted "commercial speech" absolutely protected by the First Amendment to the United States Constitution, as declared in *Linmark Associates v. Town of Willingboro*, 431 U.S. 85 (1977). Responding to that argument on respondents' motion for summary judgment, the Master in Equity, the Circuit Court and the Court of Special Appeals ruled in rapid succession that (to quote the opinion of the last, at p. 6) the Willingboro ordinance "appears very similar to the Baltimore amendment which is before us," and each accordingly declared the challenged ordinance unconstitutional.

ARGUMENT

In pressing its appeal to the Court of Special Appeals the City sought to have that Court consider whether, under *Willingboro*, the First Amendment privilege is absolute, in judging the challenged ordinance, or whether the appropriate standard of review requires application of the "balancing test" of *United States v. O'Brien*, 391 U.S. 367 (1968). However the Court declined to address that issue. (That argument will be stated in a brief and concise form in Part II herein.)

However, in seeking certiorari, the City now has and expresses a broader concern. The opinion of the Court of Special Appeals, as did the opinion of the Circuit Court, wholly ignores the question of the *consequences* of the Courts' actions. Especially since there is no specific City ordinance banning "for sale" signs, but rather a far-reaching ordinance banning virtually all signs in residential districts, and some signs in virtually all districts, this Court must consider and address the question whether any sign controls now survive in Baltimore City, or anywhere in the State.

The question is neither specious nor simple. One looks in vain to *Willingboro* itself to show how real estate signs might be entitled to the absolute protections of the First Amendment, as "commercial speech," without similarly lifting all restrictions on other commercial signs, and obnoxious and intrusive advertising. Certiorari exists to clarify, to "render more certain," to answer important but unanswered questions. The present case deserves review of the substantive issues raised below, which are of important concern to the City and its neighborhoods. The opinion of the Court of Special Appeals requires if not reversal, then review and clarification, to avert further damage to the City and its orderly scheme of laws.

I.

The Decision of the Court of Special Appeals Requires Clarification of Important Questions Left Unanswered, In Order That All Sign Legislation Not Be Cast In Doubt.

One searches in vain to find in the brief opinion of the Court of Special Appeals an answer to the next question that must be posed: assuming that the First Amendment protects the Crocketts from sanctions by the zoning authorities for their sign on McCulloh Street, how much further does the constitutional protection extend? Is it limited to sale signs, or sale and lease signs? Is it limited to residential neighborhoods? May other commercial signs of limited size, or of unlimited size, now be erected anywhere throughout the City? Is Chapter 10 of the 1971 Zoning Ordinance void in its entirety, together with all similar State and local laws which in any way inhibit any medium of commercial speech?

One looks in vain for guideposts to show how or why the factual context shared by *Willingboro* and this case ("for sale" signs) is unique from a constitional standpoint. Stated simply, if commercial speech is protected absolutely, certain consequences follow. If there are limitations to such absolute protection, they must articulated by this Court, for they have not been articulated by the Court of Special Appeals.

II.

Respondents' Motion for Summary Judgment Was Improvidently Granted.

The City postulates as answer to the dilemma created by the opinion of the Court of Special Appeals that there *is* no absolute protection of commercial speech, but that the facts and circumstances of each case must be weighed. The

City concedes that certain language of Justice Marshall in *Willingboro*, quoted at length by the Court below, would appear to afford absolute protection to commercial speech at least in the context of "for sale" signs. However, such language must be discounted or read in the context of other language and of prior decisions which apply a more flexible and reasonable standard.

The standards of review which the City advanced in the Court of Special Appeals, but which found no place in its decision, are the standards recently employed by this Court in *Donnelly Adv. Corp. v. Mayor & City Council*, 279 Md. 660 (1977), in sustaining another City sign control ordinance as against a First Amendment challenge. These are the principles adopted by the U.S. Supreme Court in *United States v. O'Brien*, 291 U.S. 367 (1969), and subsequently applied in *Young v. American Mini Theatres*, 427 U.S. 50 (1976). These standards would require a weighing of the benefits and burdens of any suppression of speech, and balancing the social interests in free expression against other legitimate interests of the state.

By deciding this case on respondents' motion for summary judgment before any discovery was conducted, the trial court made it impossible for the City to show legitimate interests in restricting signs in time, place and manner, for purposes either of comprehensive zoning or for enhancing stability of the City's integrated neighborhoods. There was quite simply no evidence in the record to establish legislative intent or purpose; and the lower courts were blinded by the simplistic "similarities" in *Willingboro*, relative to an inherently complex subject, and were therefore persuaded to simply recite findings and inference of fact from that opinion, as if the situation in Baltimore was substantially similar regardless of the requirement of proof.

The Court of Special Appeals took no cognizance of the fact that constitutional issues of this nature are inherently not susceptible of resolution on summary judgment, because of

the *O'Brien* "balancing test." Each of the "commercial speech" cases preceding *Willingboro* was decided after trial on the merits permitting a full airing of the facts, and making possible a detailed balancing of the social interests favoring speech and favoring its restriction. *Valentine v. Christensen*, 316 U.S. 52 (1942); *Breard v. Alexandria*, 341 U.S. 622 (1951); *Pittsburgh Press Co. v. Pittsburgh Comm. on Human Relations*, 413 U.S. 376 (1973); *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 746 (1976).

Even in *Willingboro* itself, Justice Marshall deferred his sweeping constitutional language (found at 431 U.S. 96-97, and at p. 5 of the opinion below) until he had thoroughly reviewed and weighed the evidence presented both in the trial court, and in the township hearings on the ordinance.

CONCLUSION

In the final analysis, the opinion of the Court of Special Appeals is deficient and its scope ill-defined, for the reason that the record on appeal was too narrow to permit appropriate analysis of those factors justifying sign controls, or analysis of the implications of a partial or total abrogation of the ordinance. The case is appropriate for certiorari to correct those deficiencies.

Respectfully submitted,

/s/ Benjamin L. Brown
City Solicitor

/s/ Michael A. Pretl
Smith, Somerville & Case
Special Deputy City Solicitors

Attorneys for Petitioners.

I HEREBY CERTIFY, That on this 29th day of July, 1980, a copy of the aforegoing was mailed, postage prepaid to Henry M. Decker, Jr., Esquire, 9 West Mulberry Street, Baltimore, Maryland 21201, and A. Dwight Pettit, Esquire, 222 St. Paul Place, Baltimore, Maryland 21202.

/s/ Michael A. Pretl

THE MAYOR AND CITY OF BALTIMORE, et al Petitioners	:	IN THE COURT OF APPEALS OF MARYLAND
v.	:	Sept. Term, 1980
JAMES CROCKETT, et ux. Respondents	:	No. 269 - Pet. Docket

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI

Petitioner, the Mayor and City Council of Baltimore, recognizes a responsibility to bring to the attention of the Court a very recent and well-considered opinion of the Attorney General of Maryland, Opinion No. 80-061, rendered on September 8, 1980, subsequent to filing of the City's petition herein. A copy of that opinion is attached.

The Maryland statutory provision (Code, art. 56, sec. 230C) and regulation of the Real Estate Commission (COMAR 09.11.01.23) reviewed by the Attorney General impose a limited or conditional restriction on "commercial speech" by real estate licensees, including "for sale" signs and other marketing techniques. The purpose of such restrictions - - enhancement of racial stability of neighborhoods - - is identical to one of the purposes of the City ordinance declared unconstitutional by the Court of Special Appeals, while the scheme and scope of regulation obviously differs in a number of respects.

Nevertheless, in judging the effect of *Linmark Associates, Inc. v. Town of Willingboro*, 431 U.S. 85 (1977), on such restrictive laws, the attached opinion is clearly at odds with the opinion of the intermediate Court for which review is here sought. In the view of the Attorney General, the applicable standard of constitutionality under *Linmark* is purely

a factual test, not an absolute standard as to which summary judgment would be proper. The Attorney General finds this interpretation of *Linmark* - - which was unseccessfully advanced by the City to the Court of Special Appeals - - supported by the intervening decision of the U.S. Supreme Court in *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York*, U.S. , 100 S. Ct. 2343 (1980).

The writ of certiorari should be granted, in order to consider the impact of *Central Hudson*, and to resolve an apparent conflict between interpretations of the State statute and the City ordinance, in addition to the reasons advanced in the original petition.

Respectfully submitted,

/s/ Benjamin L. Brown
City Solicitor

Michael A. Pretl
Smith, Somerville & Case
Special Deputy City Solicitors

Attorneys for Petitioners.

I HEREBY CERTIFY, That on this 11th day of September, 1980, a copy of the aforegoing was mailed, postage prepaid to Henry M. Decker, Jr., Esquire, 9 West Mulberry Street, Baltimore, Md. 21201, and A. Dwight Pettit, Esquire, 222 St. Paul Place, Baltimore, Md. 21202.

/s/ Michael A. Pretl

APPENDIX C

MANDATE
Court of Special Appeals of Maryland
No. 1139, September Term, 1979

MAYOR AND CITY COUNCIL OF BALTIMORE ET AL
VS.
JAMES CROCKETT ET UX

June 12, 1980 - Opinion by Thompson, J. Decree affirmed. Appellants to pay the costs.
July 14, 1980 - Mandate issued

STATEMENT OF COSTS:

In Circuit Court: OF BALTIMORE CITY

Record	30.00
Stenographer's Costs	239.25

In Court of Special Appeals:

Filing Record on Appeal	30.00
Printing Brief for Appellant	1,073.10
Reply Brief	
Portion of Record Extract – Appellant	
Printing Brief for Cross-Appellee	
Printing Brief for Appellee	160.85
Portion of Record Extract – Appellee	
Printing Brief for Cross-Appellant	

STATE OF MARYLAND, Sct:

I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Court of Special Appeals.

In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Special Appeals, this fourteenth day of July, A.D. 1980.

/s/ Howard E. Friedman
Clerk of the Court of Special Appeals of Maryland

Costs shown on this Mandate are to be settled between counsel and NOT THROUGH THIS OFFICE.

APPENDIX D

REPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1139

September Term, 1979

MAYOR AND CITY COUNCIL OF
BALTIMORE, et al.

v.

JAMES CROCKETT, et ux.

Thompson
Lowe
MacDaniel,
JJ.

Opinion by Thompson, J.

Filed June 12, 1980

On July 19, 1974, the Mayor of Baltimore approved Ordinance No. 701 which amended the City's Comprehensive Rezoning Ordinance which had been passed and approved in 1971. The effect of the amendment was to prohibit sale or lease signs on individual residences in those parts of Baltimore which had been zoned "Residence and Office-Residence Districts." The Comprehensive Zoning Ordinance had, prior to the amendment, permitted such signs. Curiously, the amendment permitted such signs within those districts on multiple-family dwellings, apartment hotels, and non-residential buildings.[1]

James and Mary Crockett, appellees, owners of a residence at 1929 McCulloch Street, which is in a residential zone, posted a "For Sale" sign on the property. A violation notice was issued by the City and when the sign was not removed the appellants, the Mayor and City Council of Baltimore and James J. Dembeck, Zoning Administrator, (both together are hereinafter called the "City" and considered as one body) filed a bill of complaint in the Circuit Court of Baltimore City seeking an injunction. The Crocketts filed an answer admitting

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[1] The amendments to Section 10.0-2b1 of the Zoning Ordinance are shown by the following excerpt from Ordinance No. 701, brackets indicating matters stricken from the prior law and italics indicating new matter added to the prior law:

> "b. The following types of signs, subject to the limitations prescribed for them, shall be permitted for uses authorized as principal or conditional uses in Residence and Office-Residence Districts:
>
> "1. One non-illuminated sale or lease sign for [each street frontage of the lot, not exceeding a height of five feet, and having an area not exceeding six square feet. For] multiple family dwellings, apartment hotels, and non-residential buildings. *Such* [such] sign shall not exceed a height of eight feet if free standing, and *shall* not *extend* above the roof line if attached to a building and *shall* not exceed an area of 36 square feet."

all of the material allegations in the bill but asserting that the zoning ordinance was unconstitutional. The Crocketts thereafter filed a motion for summary judgment and the City answered claiming that there was a dispute between the parties as to material facts.

A hearing was held before a master on March 27, 1979, at which time an affidavit of the Zoning Commissioner, James J. Dembeck, was filed, which included the following:

> "In the 1971 version of the comprehensive rezoning ordinance, it was determined that 'For Sale' signs would be permitted, with a limitation as to number and size. However, following passage of Ordinance No. 1051, [the Comprehensive Rezoning Ordinance], it was determined that 'For Sale' signs should also be included in the Zoning prohibition, since many realtors were permitting their signs to remain on properties long after they had been sold, and in some instances included 'Sold' labels on the signs; thus, instead of accomplishing what the original ordinance had sought - that is the sale of residential homes - it was learned that, in addition, such signs were also being used as a form of commercial advertising, and inasmuch as it had been the Commission's determination that commercial advertising was not to be permitted in residential neighborhoods, the Zoning Ordinance was amended to prohibit 'For Sale' signs."[2]

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[2] It appears that the Zoning Commissioner may have been shaping his statement to avoid the direct holding of *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed. 2d 155 (1977).

At the same time a stipulation by the parties was filed including a copy of the Baltimore City Council file pertaining to Ordinance No. 701, as approved on July 19, 1974. The file contained no testimony but several letters from community groups generally expressing the idea that "For Sale" signs in neighborhoods undergoing racial transition could create panic selling. There were several letters from real estate interests, expressing the view that it was improper to deprive homeowners of the means by which a substantial portion of home properties are sold.

Perhaps it is significant that in the City's memorandum before the master, there was no argument that the ordinance was passed in order to remedy a panic selling situation. The master recommended that the bill be dismissed on the basis of *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed.2d 155 (1977). At the hearing before the chancellor (Mary Arabian, J.), the City persisted in its position but *amici curiae*, Northeast, Incorporated and Harbel, Incorporated, argued that the ordinance was enacted in order to remedy a "panic selling" situation which existed in Baltimore. There was nothing in the City Council file that would support a finding that "panic selling" or "block busting" was then in progress in Baltimore City. After appropriate hearing, the chancellor adopted the report of the master and granted the motion for summary judgment. In her oral opinion, she stated in part as follows:

> "The City contends that the Master was in error and that there is a genuine dispute of material facts in the case. Its principal claim is that the Supreme Court case of *Linmark Associates, Inc. 'vs.' Willingboro*, 413 U.S. 85 (1977), is not applicable to the instant case because Ordinance No. 701 (1974) is part of Baltimore City's comprehensive zoning law Ordinance No. 1951 (Chapter 10.0-2b(1) (1971) thereof having been amended) distinguishable from

the Willingboro Ordinance, and as such regulates the time, place or manner of speech. *Linmark* stated that regulations of said nature 'stand on a different footing from laws prohibiting speech altogether' and if satisfactory alternatives of communication are available, may withstand First Amendment attack. To support its position, the City proffers that it would present at a trial on the merits the history, purpose and effect of the Ordinance through members of the City Council and representatives of the Real Estate Commission. However, all of those facts were before the Master, by way of stipulation, and the Court has carefully reviewed them. Interestingly, the Planning Commission abstained from making a recommendation and the Zoning Board gave an unfavorable report to the City Council. The only distinction between the Willingboro Ordinance (a copy of which was supplied to the Court by the City and which was also a part of its zoning law) and Ordinance No. 701 is that the former directly prohibits 'For Sale' signs while the latter does the same, in the words of the Master, 'by negative implication.' When Ordinance No. 701 was enacted no new purpose for the law was enunciated. Rather, it is urged, the Ordinance merely terminated a previous exception. The Court finds, as the Master infers, that Ordinance No. 701, in and of itself, as it applies to the prohibition of the display of 'For Sale' signs in residential and office residential districts is not 'genuinely concerned' with a regulation of time, place or manner of speech. Having so concluded, it is not necessary to consider alternative methods of communication but *Linmark* clearly addresses the inadequacy of the alternative methods of communication suggested by counsel in this matter. The Court concludes there is no genuine dispute of the material facts."

In *Linmark*, the Supreme Court phrased the question to be decided as follows:

> "[w]hether the First Amendment permits a municipality to prohibit the posting of 'For Sale' or 'Sold' signs when the municipality acts to stem what it perceives as the flight of white homeowners from a racially integrated community." 97 S.Ct. at 1615.

In evaluating the record, the Supreme Court held that the ordinance violated the First Amendment. The Court stated:

> "The record here demonstrates that respondents failed to establish that this ordinance is needed to assure that Willingboro remains an integrated community.[9] As the District Court concluded, the evidence does not support the Council's apparent fears that Willingboro was experiencing a substantial incidence of panic selling by white homeowners."

The Court's footnote is as follows:

> "[9] As the District Court itself observed, its finding concerning the lack of panic selling distinguishes this case from Barrick Realty, Inc. v. City of Gary, 491 F.2d 161 (CA7 1974), in which Gary, Indiana's prohibition on 'For Sale' signs was upheld on a record indicating that such signs were causing 'whites to move en masse and blacks to replace them.' *Id.*, at 163-164. We express no view as to whether Barrick Realty can survive Bigelow and Virginia Pharmacy Bd." 97 S.Ct. at 1619-20.

This footnote indicates that if an emergency panic selling situation existed as in *Barrick*, a "For Sale" sign ban might be constitutional. The Court in *Linmark*, continued:

"The constitutional defect in this ordinance, however, is far more basic. The Township Council here, like the Virginia Assemby in Virginia Pharmacy Bd. [v. Virginia Citizens Consumer Council, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976)] acted to prevent its residents from obtaining certain information. That information, which pertains to sales activity in Willingboro, is of vital interest to Willingboro residents, since it may bear on one of the most important decisions they have a right to make: where to live and raise their families. The Council has sought to restrict the free flow of these data because it fears that otherwise homeowners will make decisions inimical to what the Council views as the homeowners' self-interest and the corporate interest of the township: they will choose to leave town. The Council's concern then, was not with any commerical aspect of 'For Sale' signs - with offerors communicating offers to offerees - but with the substance of the information communicated to Willingboro citizens. If dissemination of this information can be restricted, then every locality in the country can suppress any facts that reflect poorly on that locality, so long as a plausible claim can be made that disclosure would cause the recipients of the information to act 'irrationally.' *Virginia Pharmacy Bd.* denies government such sweeping powers. As we said there in rejecting Virginia's claim that the only way it could enable its citizens to find their self-interest was to deny them information that is neither false nor misleading:

> 'There is . . . an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the

> channels of communication rather than to close them . . . But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.' 425 U.S., at 770, 96 S. Ct. at 1829.

> Or as Mr. Justice Brandeis put it: 'If there be time to expose through discussion the falsehood and fallacies to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.' *Whitney v. California*, 274 U.S. 357, 377, 47 S.Ct. 641, 649, 71 L.Ed. 1095 (1927) (concurring opinion).

> Since we can find no meaningful distinction between Ordinance 5-1974 and the statute overturned in *Virginia Pharmacy Bd.*, we must conclude that this ordinance violates the First Amendment." 97 S.Ct. at 1620-21.

The City argues here that its Ordinance is dissimilar to the Willingboro Ordinance because the Baltimore Ordinance is a part of a Comprehensive Zoning Plan, and that freedom of speech is not absolute but is subject "to reasonable limitations related to time, place and manner or mode of expression of the speech." The argument is not persuasive. The dissenting opinion in *Linmark Associates, Inc. v. Township of Willingboro*, 535 F.2d 786, 805-06 (3d. Cir. 1976), which is the same case that was later before the Supreme Court, shows that the amendment to the Willingboro Comprehensive Ordinance was also a zoning amendment, and it appears very similar to the Baltimore amendment which is before us. Indeed, the

failure of the Supreme Court to even mention this circumstance would indicate that the City's argument is without substantial basis. The Court did say "the Willingboro ordinance is not genuinely concerned with the place of the speech - front lawns - or the manner of the speech - signs. The township has not prohibited all lawn signs - or all lawn signs of a particular size or shape - in order to promote aesthetic values or any other values 'unrelated to the suppression of free expression.' " 431 U.S. at 93, 97 S.Ct. at 1619. The same can be said about the ordinance in question. The City further argues that in all first amendment litigation there must be a balancing of interests. Whatever merit this argument might have in another case, it has none here because we entirely agree with the chancellor that there is no substantial difference between the Willingboro Ordinance and the Baltimore Ordinance and no substantial difference in the consideration leading to its adoption despite the attempt of the Zoning Commissioner to ignore the real basis that motivated the Council to pass the ordinance and that motivated the citizens groups to support such an ordinance.

The City's primary stress in its brief and in its oral argument here is that there was a genuine dispute as to facts and the chancellor should not have proceeded by summary judgment. Appellant argues that the record discloses a genuine dispute of material facts as to whether or not the for sale sign ban is necessary to enhance stabilization of integrated neighborhoods. This argument, too, must be from desperation. We note that in its pleadings and in its arguments to the court below the City avoided making this argument which, if based on the facts, might have brought the case within the holding of *Barrick Realty, Inc. v. City of Gary*, 491 F.2d 161, 163 (7th Cir. 1974), which upheld a ban on such signs on a record showing that the signs were causing "whites to move en masse and blacks to replace them." We think it avoided the argument because there was nothing in the stipulated record to support it and we note particularly the trial judge's finding.

"An additional issue is raised by *Amicus Curiae*. The present case, he claims may fall within the possible *Barrick Realty, Inc. vs. City of Gary*, 291 F.2d 161 exception to the *Linmark* holding in that if an emergency situation exists as a result of *en masse* panic selling, emergency legislation to meet the crisis may also withstand First Amendment attack. It must be stressed that the City has not embraced that argument, the City Council did not declare such acute circumstances as reasons for its legislation and the documents of the history of Ordinance 701, as presented to the Court, do not justify a belief that such an emergency existed.

****

"The Court wishes to take the opportunity to say that from its observations, the citizens of Baltimore generally are proud of their City and it is highly unlikely that they will become victims of unethical panic peddling and resort to panic selling."

The City failed to allege in its pleadings the only triable issue of fact which could possibly have permitted the ordinance to be sustained under *Linmark*; we affirm the chancellor's grant of the motion for a summary decree. Our position is supported by *Harris v. City of Buffalo*, 90 Misc. 2d. 561, 394 N.Y.S. 2d. 794 (1977). In that case Harris, et al. sought to have a city ordinance which banned "For Sale" signs declared unconstitutional and the Court granted their motion for summary judgment stating:

"Even assuming the continued validity of that holding, [*Barrick*] however, the instant motion must be granted as the defendant City has offered absolutely no factual support of its conclusory allegations

concerning 'blockbusting', 'panic selling' and other evidentiary criteria upon which the *Barrick* decision and the City's position herein are founded."

DECREE AFFIRMED.
APPELLANTS TO PAY THE COSTS.

APPENDIX E

MAYOR AND CITY COUNCIL OF BALTIMORE	:	IN THE CIRCUIT COURT
and	:	OF
JAMES J. DEMBECK,	:	BALTIMORE CITY
Plaintiffs	:	
V.	:	A-821/1977;A-57188
JAMES CROCKETT	:	
and	:	
MARY CROCKETT, his wife	:	
Defendants	:	

ORDER

This case having come on for hearing on exceptions filed by the Mayor and City Council of Baltimore to the Report and Recommendation of the General Equity Master, the Court having examined the pleadings, stipulation and affidavits on file, having considered the memoranda submitted by counsel for the parties and for amici curiae, and counsel for the parties and for amici curiae having been fully heard, it is by the Circuit Court of Baltimore City this 18th day of July, 1979,

ORDERED that the Report of the General Equity Master, whose views are hereby adopted as those of this Court, is hereby ratified and approved, that the Defendants' Motion for Summary Judgment be and the same is hereby granted, and that the Bill of Complaint be dismissed, with the costs to be assessed against the Plaintiffs.

/s/ Mary Arabian
Judge

Approved as to form:

/s/ Ronald J. Wiley

/s/ Richard M. Hartman
Attorney for Plaintiffs

APPENDIX F

JULY 13, 1979

(T. 83) **PROCEEDINGS**

THE COURT: This case comes before the Court on the City's Exceptions to the General Equity Master's Report and Recommendation filed April 17, 1979, granting the Defendants' Motion for a Summary Judgment.

It should be noted that the argument of Defense Counsel that the City's failure to join one of the Plaintiffs, i.e., James J. Dembeck, in its Exceptions may be fatal is without merit since the Court would permit an amendment to correct the oversight.

Moreover, the City's alleged failure to comply with Supreme Bench Rule 574 would not bar a consideration by the Court of additional issues of law and fact if the justice of the case required it. Rule 574 (d).

However, neither conclusion will advance the City's cause in this case since the Court is convinced that the General Equity Master was not clearly erroneous in his decision and the Court hereby adopts his Report and Recommendation.

In arriving at its ruling, the Court has carefully considered all of the pleadings, stipulations and arguments, both verbal and written, so ably presented by all counsel.

The City contends that the Master was in error and that there is a genuine dispute of material facts in the case. Its principal claim in this matter is that the Supreme (T. 84) Court case of *Linmark Associates, Inc. v. Willingboro*, 413

U.S. 85 (1977), is not applicable to the instant case because Ordinance No. 701 (1974) is part of Baltimore City's comprehensive zoning law, Ordinance No. 1951 (Chapter 10.0-2b(1) (1971) thereof having been amended), distinguishable from the Willingboro Ordinance, and as such regulates the time, place or manner of speech. *Linmark* stated that regulations of said nature "stand on a different footing from laws prohibiting speech altogether" and if satisfactory alternatives of communication are available, may withstand First Amendment attack. To support its position, the City proffers that it would present at a trial on the merits the history, purpose and effect of the Ordinance through members of the City Council and representatives of the Real Estate Commission. However, all of those facts were before the Master, by way of stipulation, and the Court has carefully reviewed them. Interestingly, the Planning Commission abstained from making a recommendation and the Zoning Board gave an unfavorable report to the City Council. The only distinction between the Willingboro Ordinance (a copy of which was supplied to the Court by the City and which was also a part of its general zoning law) and Ordinance No. 701 is that the former directly prohibits "For Sale" signs while the latter does the same, in the words of the Master, "by negative implication." When Ordinance No. 701 was enacted, (T. 85) no new purpose for the law was enunciated. Rather, it is urged, the Ordinance merely terminated a previous exception. The Court finds, as the Master infers, that Ordinance No. 701, in and of itself, as it applies to the prohibition of the display of "For Sale" signs in residential and office residential districts is not "genuinely concerned" with a regulation of time, place or manner of speech. Having so concluded, it is not necessary to consider alternative methods of communication but *Linmark* clearly addressed the inadequacy of the alternative methods of communication suggested by counsel in this matter. The Court concludes there is no genuine dispute of the material facts.

An additional issue is raised by *Amicus Curiae*. The present case, he claims, may fall within the possible *Barrick*

Realty, Inc. v. City of Gary, 291 F.2d 161, exception to the *Linmark* holding in that if an emergency situation exists as a result of *en masse* panic selling, emergency legislation to meet the crisis may also withstand First Amendment attack. It must be stressed that the City has not embraced that argument, the City Council did not declare such acute circumstances as reasons for its legislation and the documents of the history of Ordinance 701, as presented to the Court, do not justify a belief that such an emergency existed.

The Court also wishes to emphasize that the (T. 86) suggestion of *Amicus Curiae* that the effect of the Court's decision will negate the entire Baltimore City Zoning Law is completely without merit. The ruling is limited to the only issue raised by Defendants in the case, i.e. displaying of "For Sale" signs.

Therefore, for the reasons set forth therein, the Court hereby adopts the Report and Recommendation of the General Equity Master and will sign an appropriate Order prepared by Defense Counsel in accordance therewith.

The Court wishes to take the opportunity to say that from its observations, the citizens of Baltimore generally are proud of their City and it is highly unlikely that they will become victims of unethical panic peddling and resort to panic selling.

(CONCLUSION OF PROCEEDINGS)

APPENDIX G

MAYOR AND CITY COUNCIL OF BALTIMORE	:	IN THE CIRCUIT COURT
AND	:	OF
JAMES J. DEMBECK	:	BALTIMORE CITY
vs.	:	FILE NO. A-57188
JAMES CROCKETT	:	DOCKET: A-117
AND	:	FOLIO: 821
MARY CROCKETT, his wife	:	

: :

REPORT AND RECOMMENDATION

This matter came on for hearing before the General Equity Master on March 27, 1979 upon the Defendants' Motion for Summary Judgment [Paper No. 4]. It is recommended that the Motion be granted and that the Bill of Complaint be dismissed, with the costs to be assessed against the Plaintiffs.

This case raises the question of the constitutionality of a portion of a Baltimore City Zoning Ordinance, Ordinance 1051, Chapter 10.0-2b1 (1971), as amended by Ordinance No. 701 (1974) which, by negative implication, prohibits the posting of a "for sale" sign on or about the Defendants' property which is located in a residential district in Baltimore City and known as 1929 McCulloh St. None of the facts material to this case are in dispute.

The Ordinance in question was intended to, and effectively does, ban the use of "for sale" signs in the promotion and sale of individual dwelling units in residential and office-residential zones. Having posted such a sign on their property, the Defendants fall within the purview of the

Ordinance and have been duly cited for its violation. (Plaintiffs' Exhibit No. 1). They contend that the application of this Ordinance to them is unconstitutional in that it violates their First Amendment rights. The Master agrees and relies upon the case of *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977) for his opinion.

With the sole exception of Mr. Justice Rehnquist (who took no part in the consideration or decision) a unanimous Supreme Court, speaking through Mr. Justice Thurgood Marshall concluded that the Willingboro Ordinance banning "for sale" and "sold" signs was constitutionally infirm because the First Amendment prevented the government (the township of Willingboro) from achieving its goals of racial stability and the discouragement of panic selling, notwithstanding their legitimacy, by means of restricting the free flow of truthful information, albeit commercial in nature. For an in-depth analysis of the *Linmark* decision, see 7 U. Balt. L. Rev. 73 (1977). The mere fact that this Ordinance is termed a comprehensive Zoning Ordinance does not clothe it with constitutionality. See *Schoen vs. Township of Hillside*, 155 N.J. Super 286 (1977); *Berg Agency vs. Township of Maplewood*, 163 N.J. Super 542 (1978). Consequently, to the extent that Chapter 10.0-2-b1 proscribes or is applied to prohibit the display of "for sale" signs in residential and office-residential districts in Baltimore City, it is unconstitutional and therefore unenforceable in the application which is the subject of this controversy.

It is therefore recommended that the Motion for Summary Judgment be granted and this case dismissed. A recommended Order is annexed pursuant to the provisions of Supreme Bench Rule 571 E 4.

/s/ James F. Schneider
Master in Chancery

April 17, 1979
Same day, copies mailed.